

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ILLINOIS

EPA Region 5 Records Ctr.



257724

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 91-CV578-JLF
v.	)	
	)	
NL INDUSTRIES, INC., <u>et al.</u> ,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
CITY OF GRANITE CITY, ILLINOIS,	)	
LAFAYETTE H. HOCHULI, and	)	
DANIEL M. McDOWELL,	)	
	)	
Intervenor-Defendants.	)	

NOTICE OF RE-FILING, MOTION IN LIMINE, AND  
SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THE UNITED  
STATES' MOTION FOR A RULING ON THE APPROPRIATE  
SCOPE AND STANDARD OF REVIEW OF AGENCY ACTION

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), hereby re-submits<sup>1</sup> its Motion, and Memorandum in Support, for a Ruling on the Appropriate Scope and Standard of Review of Agency Action and for a Protective Order Limiting the Scope of Discovery ("Record Review Motion").<sup>2</sup> Along with its original motion and accompanying memoranda, the United States submits this supplemental memorandum in support of that motion. The United

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<sup>1</sup> By submitting this Memorandum, the United States does not waive its jurisdictional argument. See United States' Motion to Dismiss the City's Counterclaim.

<sup>2</sup> The United States first submitted its Record Review Motion on May 11, 1992. Intervenor-Defendants Granite City responded to that motion on July 23, 1992. On August 31, 1993, prior to ruling on the United States' motion, this Court entered an Order dismissing all pending motions without prejudice to refiling the motions at a later date.

States specifically requests that this Court grant its Record Review Motion with regard to the City of Granite City's Motion for a Preliminary Injunction prior to the hearing on the Preliminary Injunction.

I. Section 113(j) of CERCLA Limits Review of U.S. EPA's Selected Remedy by this Court Regardless of the Type of Hearing Requested

On August 16, 1994, Intervenor-Defendant the City of Granite City ("City") filed a motion for a temporary restraining order and preliminary injunction, seeking to enjoin U.S. EPA from cleaning up the NL Site. In its motion, the City challenges U.S. EPA's selected cleanup for the Site embodied in the ROD.<sup>3</sup>

Sections 113(k) and 117 of CERCLA, 42 U.S.C. §§ 9613(k) and 9617, and the NCP, 40 C.F.R. § 300.67 (1989), describe the public participation, notice, and comment procedures to be used in the compilation of administrative records and the selection of remedies at Superfund sites.<sup>4</sup>

CERCLA expressly states that judicial review of U.S. EPA's selection of response actions for a site must be on the administrative record, and that the standard of judicial review shall be the arbitrary and capricious standard:

(1) Limitation. In any judicial action under this chapter, judicial review of any issues concerning the adequacy of any response action taken or ordered by the

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<sup>3</sup> The ROD, AR No. 217, also includes U.S. EPA's response to the comments received during the public comment period. See Responsiveness Summary, AR No. 219 and 220.

<sup>4</sup> In fact, much of the Record Review Brief is not applicable to the City since the City cannot make the same lack of notice argument made by the PRP defendants. See Record Review Brief at pp. 19-28.

President shall be limited to the administrative record. Otherwise applicable principles of administrative law shall govern whether any supplemental materials may be considered by the court.

(2) Standard. In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.

CERCLA Section 113(j), 42 U.S.C. §9613(j) (emphasis added).

In the Record Review Brief, the United States explains CERCLA's statutory scheme which provides the organic law under which U.S. EPA selects cleanup decisions in accordance with principles of administrative law. Contrary to the Defendants' claim, the City knew about U.S. EPA's proposed plan and, in fact, commented on that plan. See AR No. 193.

This limitation on judicial review is further supported by general principles of administrative law. The Seventh Circuit has stressed that judicial review should be based on "the administrative record already in existence, not some new record made initially in the reviewing court." Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 444 (7th Cir. 1990). The Cronin court held that in reviewing an agency decision, "the district court is a reviewing court, like this [appellate] court; it does not take evidence." Id. at 443.

The Administrative Record filed by the United States in this case provides extensive detail on the studies, reports, comments, and facts U.S. EPA considered in making its remedy decision. The Seventh Circuit has held that where the agency decision is set

forth in a "substantial document," evidentiary hearings are improper. Cronin, 919 F.2d at 444. The Administrative Record, including the March 30, 1990 ROD for the Site, provide the Court with the contemporaneous record compiled by U.S. EPA and the "substantial document" embodying the remedy decision for the NL Site necessary to satisfy the standards set forth by the court in Cronin.

Furthermore, the very case cited at length by the City, United States v. Princeton Gamma-Tech, Inc., No. 93-5252, 1994 WL 394696 (Aug. 1, 1994) (attached to City's Brief) ("PGT"), supports the application of limited judicial review in the preliminary injunction context.<sup>5</sup> The PGT court, after finding jurisdiction available, affirmed the lower court's ruling that it is the defendant's burden to show that U.S. EPA's choice of remedy was arbitrary and capricious, based upon the administrative record. Id. at 10-11. See United States v. Princeton Gamma-Tech, Inc., 817 F.Supp. 488, 494 (D.N.J. 1993) (reversed on other grounds) ("section 113(j) of CERCLA requires the court to review only the administrative record to determine if the EPA's decisions were arbitrary and capricious. Because there is no basis for de novo review of EPA's remedy selection, there is consequently no need for discovery outside the administrative records regarding the remedy selection.").

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<sup>5</sup> As more fully explained in the United States' Motion to Dismiss the City's Counterclaim, the United States does not agree with the jurisdictional holding in PGT.

Since the filing of the United States' Record Review Motion, a number of courts have upheld the limitation on judicial review of U.S. EPA's decisions. See e.g., U.S. v. Gurley Refining Co., 788 F. Supp. 1473, 1481 (E.D. Ark. 1992); Foundation for Global Sustainability v. McConnell, 829 F. Supp. 147, 150 (W.D.N.C. 1993) (quoting Cronin and holding that the court may rely only on evidence that was before the agency when it made its decision); Sierra Club v. Robertson, 784 F. Supp. 593, 601 (W.D. Ark. 1991) (citing Cronin and holding that "the issue before this court is not whether a preliminary injunction should issue, but whether the Forest Service's . . . timber sales decisions pass muster under an arbitrary and capricious standard of review"); United States v. Shell Oil Co., No. CV-91-0589 RJK (Feb. 16, 1993) (the scope of review of a response action shall be limited to the administrative record and the arbitrary and capricious standard of review shall apply).

The fact that the City brings its challenge to U.S. EPA's selected remedy in the form of a request for a preliminary injunction in no way undercuts CERCLA's limitation on judicial review. The City's request to enjoin U.S. EPA from implementing the Agency's lawfully selected remedy at the NL Site is based almost entirely upon speculation and conjecture. (See e.g. Verified Complaint at p. 2. "As a result of the remedial action Granite City will be subject to . . . a probable increase in lead dust . . . Granite City may be required to employ additional police, health and other personnel . . .") (emphasis

added). Therefore, since the City is clearly seeking to challenge U.S. EPA's selection of the remedy, such challenge, if reviewed at all by this Court, is subject to the limitations set forth in Section 113(j) of CERCLA, 42 U.S.C. § 9613(j).<sup>6</sup>

II. The City Cannot Support its Present Claims Based upon on a Draft Blood-Lead Study that is Outside the Administrative Record

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The City also alleges that the existence of a draft health study, commissioned by the federal government, should preclude U.S. EPA from implementing the remedy in the ROD. The City cites to the NCP, 40 C.F.R. § 300.825(c), for the proposition that U.S. EPA must now include the IDPH blood study as part of the Administrative Record.

First, that study has not been released in final form. Rather, the study was released in draft form, providing the public the opportunity to comment on the study. No comments were received in support of that study. In fact, the only comment received was from U.S. EPA. There, the Agency criticized the

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<sup>6</sup> For example, the City alleges, among other things, that the City would be irreparably harmed due to dispersion of lead contaminated dust during the excavation. The City claims "EPA failed to take into account health threats the cleanup will pose." See City Memorandum p. 12. Yet, in the very next paragraph the City acknowledges that in the administrative record U.S. EPA addressed these very concerns. See City Memorandum p. 12; See also ROD, AR No. 219, p. 10. In fact, nowhere in the City's Motion or accompanying papers does the City allege that U.S. EPA has failed to perform any of the health and safety measures outlined in the ROD.

The United States will respond to each of the City's allegations that the ROD is arbitrary and capricious based upon the Administrative Record in its brief on the merits which will be served, by agreement, on or before September 9, 1994.

study's methodology and conclusions as unsupported and scientifically flawed.<sup>7</sup>

Second, at no time, until the filing of its motion, has any party, including the City, formally requested that U.S. EPA evaluate the study pursuant to the NCP, 40 C.F.R. § 300.825(c), which provides for supplementation of the administrative record under certain circumstances.<sup>8</sup> Nonetheless, U.S. EPA voluntarily has undertaken to evaluate the study in a full reopening of the Administrative Record. Under these circumstances, the Blood study should not be included in the administrative record or otherwise considered by the Court in determining the City's Motion.

#### CONCLUSION

As the foregoing discussion clearly illustrates, Granite City, in its Motion for a Preliminary Injunction, is directly challenging the remedy for the NL Superfund Site, selected

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<sup>7</sup> ATSDR submitted its peer review comments on the study before its release for public comment. ATSDR's peer comments, a necessary step in the performance of that study which ATSDR funded, was also highly critical of the study's methodology and conclusions.

<sup>8</sup> As a general rule, review on the administrative record eliminates the need for discovery, as the administrative record contains all that is relevant to the decision in issue. See United States v. Morgan, 313 U.S. 409, 422, 61 S.Ct. 999, 1004, 85 L.Ed. 1429 (1941). The United States acknowledges that there are exceptions to this rule. Those exceptions are limited to situations in which: (1) judicial review is frustrated because the record fails to explain the agency's action; (2) the record is incomplete; (3) the agency failed to consider all the relevant factors; or (4) there is a strong showing that the agency engaged in improper behavior or acted in bad faith. See Record Review Brief at pp. 31-37.

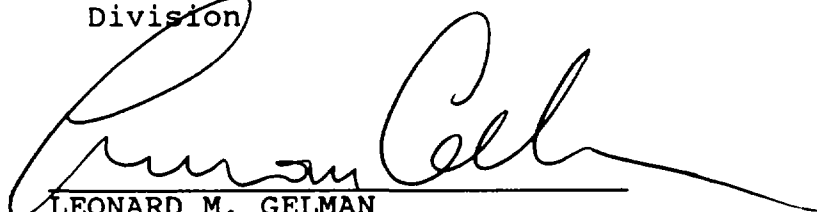
The City fails to make any credible showing that any of these exceptions apply. The United States will address the City's misplaced allegations in the United States' Opposition on the Merits of the Preliminary Injunction.

consistent with the provisions of CERCLA and the NCP. As Section 113(j) of CERCLA, 42 U.S.C. § 9613(j), provides, any challenge to U.S. EPA's selected remedy is limited to a review by this Court of the Administrative Record under the arbitrary and capricious standard.

WHEREFORE, the United States requests that this Honorable Court enter an Order limiting the scope of review to the Administrative Record based on the arbitrary and capricious standard, and prohibit any additional evidence to be presented or discovery taken.

Submitted this 30<sup>th</sup> day of August, 1994.

LOIS J. SCHIFFER  
Acting Assistant Attorney General  
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A large, stylized handwritten signature in black ink, appearing to read 'Leonard M. Gelman', is written over the typed name and address.

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